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IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 80

EMMETT CANARD, CYRIL MYERS, PETER STAFFORD and GEORGE MILLER,

Petitioners,

vs.

STATE OF CALIFORNIA, COURT OF APPEAL, SECOND APPELLATE DISTRICT,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1967

No.

EMMETT CANARD, CYRIL MYERS, PETER STAFFORD and GEORGE MILLER,

Petitioners,

vs.

STATE OF CALIFORNIA, COURT OF APPEAL, SECOND APPELLATE DISTRICT,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Emmett Canard, Cyril Myers, Peter Stafford and George Miller, defendants and petitioners, pray for a writ of certiorari to the Court of Appeal, Second Appellate District, State of California, to review its judgment affirming judgments of the Superior Court of the State of California, in and for the County of Los Angeles, sentencing the petitioners as hereinafter set forth.

The defendants were found guilty as follows:

Peter Stafford – Guilty of conspiracy, in violation of section 182 of the California Penal Code, as charged in the amended indictment (C.T. p. 145).

Cyril Myers – Guilty of conspiracy, in violation of section 182 of the California Penal Code, as charged in the amended indictment (C.T. p. 145).

Maury Adler – Guilty of conspiracy, in violation of section 182 of the California Penal Code, as charged in the amended indictment (C.T. p. 146).

George Miller – Guilty of conspiracy, in violation of section 182 of the California Penal Code, as charged in the amended indictment (C.T. p. 147).

Emmett Canard – Guilty of conspiracy, in violation of section 182 of the California Penal Code, as charged in the amended indictment (C.T. p. 148)

A special verdict is found at page 149 of the Clerk's Transcript, defining that the objects of the conspiracy were:

1. To offer bribes, in violation of section 67 of the California Penal Code.

2. To accept bribes, in violation of section 68 of the California Penal Code.

3. To violate the laws relating to bookmaking, in violation of section 337a of the California Penal Code.

4. To obstruct justice and the due administration of the laws as pertain to bribery and bookmaking, in violation of section 182.5 of the California Penal Code.

Jurors were polled and all answered that it was their verdict in the affirmative (C.T. p. 143).

Sentences were as follows:

Peter Stafford – Sentenced to state prison for the

term prescribed by law for the crime of conspiracy (section 182 of the Penal Code, as charged in Count I) (C.T. p. 203).

Cyril Myers – Probation five years, proceedings suspended, six months in county jail, and $5,000 fine (C.T. p. 201).

George Miller – Proceedings suspended, probation five years, sixty days in county jail as condition, and fine of $2,500 (C.T. p. 289).

Emmett Canard – Probation five years, proceedings suspended, ninety days in county jail, and $1,000 fine (C.T. p. 202).

Notices of appeal were duly filed (C.T. pp. 204-212) and bail fixed upon appeal.

OPINIONS BELOW

Trial in the Superior Court was by a jury. The opinion of the court below, the Court of Appeal, Second Appellate District, State of California, is appended hereto as Appendix "A" and is also found in the clerk's record below. The opinion of the Court of Appeal was filed December 26, 1967, and is reported at 257 A.C.A. 500.

After affirmation by the Court of Appeal, a timely petition for hearing was filed with the Supreme Court of the State of California, and was denied February 19, 1968, and is reported in the minutes 68 A.C.; Pamphlet No. 8, March 1, 1968, page 3.

A petition to recall the remittitur was duly lodged with the Court of Appeal of the State of California but, by that court, denied. Subsequently, a petition to recall the remittitur and an application to the Supreme Court of California for stay

of execution was filed, and said petition has as yet not been acted upon by the California Supreme Court. The within petition, however, must be filed so that it will be timely filed with this Court, regardless of the decision at this time on the motion to recall the remittitur lodged with the California Supreme Court. The trial court, the Superior Court of California, has granted a stay of execution to permit the timely filing of this petition for certiorari with this Court.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment sought to be reviewed and the time of its entry is December 26, 1967 (reported at 257 A.C.A. 500). A timely petition was filed with the Supreme Court of the State of California and was, by that court, denied on February 19, 1968 (reported in the minutes of 68 A.C., Pamphlet No. 8, March 1, 1968). The statutory provision believed to confer on this Court jurisdiction to review the judgment in question, by writ of certiorari, is 28 U.S.C. 1255(f).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved are the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Article I, section 19, of the Constitution of the State of California; and sections 67, 68, 337a and 182.5 of the Penal Code of the State of California.

QUESTIONS PRESENTED FOR REVIEW

1. The trial court erred in permitting cross-examination of petitioner Peter Stafford as to testimony given by him before the grand jury. It is our contention that the testimony before the grand jury was given by Stafford under compulsion.

2. Petitioner Stafford was denied a fair trial and due process, in violation of the Fourteenth Amendment to the United States Constitution, by reason of his detention and unlawful search and the use of the fruits thereof at the trial. The search was in violation of the Fourth and Fifth Amendments to the United States Constitution and Article I, Section 19, of the Constitution of the State of California.

3. The trial court erred in denying a mistrial when Officer Gunn testified that in a conversation with DeMaddalena about Stafford and Stafford's access to "muscle" – setting up individuals for a working over – he had asked if Lipowitz, a bookmaker, was one of the persons and DeMaddalena had replied yes, and the resulting unfavorable publicity in the press and on television news.

4. The interception of a telephone call between Officer Gunn and Sgt. Stafford and the use of the recording of the conversation was in violation of the Fourth, Fifth and Sixth Amendments to the United States Constitution and 28 U.S.C. 605, the Federal Communications Act. (There are numerous other interceptions which we complain of, which were subsidiary to this and which will be treated in the argument covering this point.)

5. The evidence was insufficient to sustain the judgment of guilty as to Count I as to any of the defendants.

STATEMENT OF THE CASE

By an indictment filed by the grand jury of the County of Los Angeles, State of California (Clerk's Transcript–herein C.T.–pp. 1–10) and an amended indictment (C.T. p. 13), Peter E. Stafford and Henry DeMaddalena–who it is charged were members of the Los Angeles Police Department– and Emmett Canard, Cyril Myers, Maury Adler and George Miller were charged, in Count I, with the offense of a felony, namely, conspiracy to violate sections 67, 68, 337a and 182.5 of the Penal Code of the State of California, in that on or about the 15th day of February, 1964, and continuously thereafter to and including the 20th of March, 1964, the above-named defendants, together with other persons, did, at and in the County of Los Angeles, State of California, unlawfully, corruptly and feloniously conspire, combine, confederate and agree: **First:** to offer and give bribes to executive officers in the State of California, in violation of section 67 of said Penal Code; **Second**, to ask for and receive bribes for executive officers, ministerial officers, employees and appointees of the City of Los Angeles, in violation of section 68 of said Penal Code; **Third**, to engage in pool selling and bookmaking, in violation of section 337a of the said Penal Code; and **Fourth**, to pervert and obstruct justice and the due administration of the laws pertaining to pool selling and bookmaking and offering, giving, asking for and receiving bribes, in violation of section 182.5 of said Penal Code. Thereafter numerous overt acts were named.

Count II charged Henry DeMaddalena with offering and giving a bribe to an executive officer in the State of California, in violation of section 67 of the Penal Code, a felony, in that

on or about the 15th day of February, 1964, the said DeMaddalena did wilfully, unlawfully, feloniously and corruptly offer and give a bribe to Joseph Gunn, an executive officer in the State of California, to wit, a member of the Los Angeles Police Department, with the intent then and there to wilfully, unlawfully, feloniously and corruptly influence the actions, decisions, and opinions of the said Joseph Gunn in the performance of his duties as a member of the Los Angeles Police Department. (C.T. p. 3)

Count III charged DeMaddalena with offering and giving a bribe to an executive officer in the State of California, in violation of section 67 of the Penal Code, a felony, in that DeMaddalena did wilfully, unlawfully, feloniously and corruptly offer and give a bribe to Joseph Gunn, a member of the Los Angeles Police Department, with the intent then and there to wilfully, unlawfully, feloniously and corruptly influence the actions, decisions and opinions of the said Joseph Gunn in the performance of his duties as a member of the Los Angeles Police Department. (C.T. p. 4)

As provided by section 995 of the California Penal Code, motions for each defendant were made to set aside the indictment. Said motions were argued and submitted. The motions were denied, and the defendants entered pleas of "Not Guilty." (C.T. p. 17)

A motion to suppress evidence was filed March 4, 1965, on behalf of defendant Peter Stafford (C.T. p. 32). A notice of motion to suppress was also filed March 4, 1965 (C.T. p. 34). Said motion also contained a request to examine certain recordings, tapes, and other documents and statements, pursuant to the right of discovery. The motion for discovery was granted except as to one item; i.e., Item 6 thereof. The District Attorney

indicated that he did not have the requested statements. (C.T. p. 39)

C. McCoy was relieved as counsel and Deputy Public Defender I. Garfinkel was appointed on behalf of Henry DeMaddalena (C.T. p. 40).

On April 12, 1965, the case was called for trial; the motion to suppress was denied at that time, without prejudice; the motion to set aside the plea in order to have the court reconsider the former ruling on motion pursuant to 995 P.C. was denied; and the reporter was ordered to prepare an original and four copies of daily transcript (C.T. p. 42).

On April 15, 1965, trial commenced (C.T. p. 45).

On April 23, 1965, motions were filed on behalf of the defendants, requesting the court to poll the jurors re defense Exhibit D, a Sunset Edition of the Los Angeles Herald-Examiner newspaper—which was admitted into evidence (not to go to the jury), and said motions were denied. Defendants' motions for a mistrial were denied. Other exhibits were admitted into evidence (not to go to the jury): Exhibit K, a Los Angeles Herald-Examiner article dated April 19, 1965, and Exhibit L, a Herald-Examiner article dated April 23, 1965. Motions for the court to poll the jurors re Exhibit L and motions for mistrial were denied. The trial resumed. (C.T. p. 51)

A motion to suppress was made, witnesses were called (out of the presence of the jury), and People's Exhibits 3, 69 and 70 (each a notebook) were admitted into evidence (C.T. p. 53).

On April 28, 1965, Roger Matthews and Patricia Locricchio were granted immunity (C.T. p. 54).

On May 3, 1965, defendants offered Exhibits R and S (each a TV report of April 23, 1965), T (a Los Angeles Herald-Examiner newspaper dated April 23, 1965), and U (a newspaper

clipping dated April 27, 1965), and said exhibits were admitted into evidence (not to go to the jury). Defendants' motion to strike and motion to poll the jury re Exhibits R and S and motion for mistrial were denied (C.T. p. 57).

On May 3, 1965, the People rested (C.T. p. 57). Defendants' motion asking the court to invoke section 1385 of the California Penal Code, and dismiss, was denied.

On May 5, 1965, in support of objection to certain testimony, Peter Stafford testified (out of the presence of the jury). The court overruled the objection. (C.T. p. 59)

On May 10, 1965 (C.T. p. 62) Defendants' Exhibit Y, a newspaper clipping, was received in evidence.

Instructions given, consisting of some 62 pages, are found in the Clerk's Transcript commencing at page 71. Instructions refused are found beginning at page 134 of the Clerk's Transcript.

Motions for a new trial were made and notice of intention to move for a new trial was filed by defendants Emmett Canard and Peter Stafford. (See written Notice of Intention To Move For New Trial – C.T. pp. 157-178)

A Notice of Intention To Move For New Trial was filed by defendants Adler, Myers and Miller (C.T. p. 184).

All motions for new trial were argued by counsel and by the court denied (C.T. pp. 193-197).

SUMMARY OF THE EVIDENCE

In the interest of brevity of this petition, facts pertinent to the determination of the appeal and this petition are set forth in a footnote[1].

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[1]Commencing at page 46 herein.

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING THE SAME

I

The Trial Court Erred In Permitting Cross-Examination Of Petitioner Peter Stafford As To Testimony Given By Him Before The Grand Jury. It Is Our Contention That The Testimony Before The Grand Jury Was Given By Stafford Under Compulsion.

May we direct the Court's attention to page 28 of Appendix "A" attached hereto, wherein the Court of Appeal, in passing upon this question raised on appeal before it, used the following language:

> "The prosecution, in its cross-examination of Stafford, was permitted to refer on occasion to his testimony given before the grand jury. The evidence establishes that defendant was told before he appeared before the grand jury, pursuant to subpoena, that if he refused to testify by invoking the Fifth Amendment, it meant dismissal from the force. Defendant testified, on redirect examination, that he knew, if he refused to testify, he would be fired. When the prosecutor sought to impeach him through the use of his grand jury testimony, the defense objected that the testimony was involuntary, being the product of coercion.
>
> "In *Garrity v. New Jersey* (1967) [385] U.S. [493], 17 L.ed 2d 562, decided during the pendency of this appeal, the Supreme Court held that (at p.___), '. . . the protection of the individual under

the Fourteenth Amendment against coerced confessions prohibits use in subsequent criminal proceedings of confessions obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.' The defendants in *Garrity* were police officers who, before being questioned about an investigation concerning the fixing of traffic tickets, were told that anything they said could be used against them in state criminal proceedings; that they had the privilege to refuse to answer if the disclosure would tend to incriminate them; but that if they did refuse to answer they would be subject to being removed from office.

"The same principles which operate to exclude involuntary confessions of an accused, also require exclusion of involuntary admissions where sought to be used as affirmative evidence of guilt. (*People v. Atchley*, 53 Cal.2d 160, 169-170.) It is further established that an accused's involuntary confessions may not be used to impeach him. (*People v. Underwood*, 61 Cal.2d 113, 120-121.) This being so, the court in *Underwood* concluded (at pp. 120-121), '. . . a similar rule should operate to exclude involuntary *admissions* when they are offered for that purpose . . . [Citations.]' Any prior inconsistent statement of the accused relative to the offense charged, constitutes an admission within the meaning of the principles regarding admissibility of involuntary statements, where used to impeach his credibility. (*People v. Atchley, supra*, 53 Cal.2d 160, 170; *People*

v. Underwood, supra, 61 Cal.2d 113, 121-122.)

"The prosecution sought in the following instances to impeach Stafford using his grand jury testimony:

"Stafford testified that on March 13th he found two notebooks in the office while he was cleaning a file cabinet. One of the books had the note attached 'Possibly came out of NZK 002, a 1962 blue Ford.' He wrote the number in his notebook and called the Department of Motor Vehicles to attempt to locate where the notebooks belonged. He had lost a notebook himself and the next day he called the motor pool and inadvertently gave that number as the number of the car he had used. 'And what happened, I just made a mistake, and since I had this number on my mind, I ran NZK 002 instead of the number that I had out.' On cross-examination defendant was asked when it was he first recalled that he had mistakenly associated the number NZK 002 with the loss of his own notebook. He testified that it was after he had testified before the grand jury. He was then asked whether at the grand jury hearing he was questioned about the number. Defendant indicated that he had been asked about it; that at the time he testified before the grand jury he did not recall his mistake.

"Stafford testified on cross-examination that he knew his codefendant Canard to be a part-time bartender and gambler. The prosecutor, attempting to establish that Stafford knew Canard to be a bookmaker, referred to the fact phone numbers of book-

making establishments appeared next to Canard's name in Stafford's notebook. Stafford testified that he placed them there because he 'had to associate them with somebody' and he knew Canard hung around those locations. Stafford was then asked to read certain testimony he gave before the grand jury. He was then asked whether he believed these were Canard's places. The grand jury testimony referred to was never read into the record. Stafford testified that he had stated before the grand jury that the places may have belonged to Canard. He then indicated that it was rumored that Canard was engaged in bookmaking at those spots.

"The prosecutor asked Stafford about his relationship with Cyril Myers. Stafford testified he knew Myers as a gambler and heard he had loaned a bookmaker money for a bookmaking operation. It was then brought out that before the grand jury Stafford had testified that Myers 'was the money behind' some bookmaking. The defense objected that the grand jury testimony was not impeaching evidence; that there was nothing inconsistent about the former testimony.

"Finally, Stafford was questioned about the entry in his notebook 'make meet with Cy, Maury, Hank.' Defendant testified it referred to Gordon Jones, Hank Weldon and Maury Rissman. He stated that there was no arrangement to meet Myers and Adler at the Westward Ho Restaurant. He was then referred to his grand jury testimony. His former testimony was that he did not recall what the

notation meant or to whom it referred; he could not remember whether the 'Maury' referred to Maury Adler; there had been no prior arrangement to meet Myers, Adler or DeMaddalena at the Westward Ho. At this point the defense again objected this was not impeachment; that it was Stafford's testimony almost word for word."

Then the Appellate Court, in error, said:

"The jury was admonished that this line of questioning was admissible solely on the issue of Stafford's credibility as a witness.

"Manifestly, the use of the grand jury testimony had little, if any, impeaching effect (as the defense was quick to point out at the time the prosecution sought to employ it). If *Garrity, supra,* applies, retroactively, to this case, the trial court was in error in permitting the prosecution to use Stafford's grand jury testimony in impeaching him. Whether or not that decision will be so applied has not yet been decided by the Supreme Court of this state. We need not decide it here, since, assuming that error was committed, it was not prejudicial. Beyond a reasonable doubt, the error in permitting the use of the grand jury testimony could not have prejudiced Stafford. (*Chapman v. California* (1967) 386 U.S. 18, 24.)" [Appendix "A" pp. 28-31.]

As will be more fully demonstrated hereinafter, from the time of Stafford's being stopped in the schoolyard where he was delivering his young son, he was under compulsion. Certainly, as we will point out later in the argument hereunder, Stafford was prejudiced by the use of his testimony before the

grand jury in an attempt to impeach him before the trial court.

In giving a fair appraisal of the Police Department toward Stafford and the compulsion used upon STafford to compel him to testify, one must have a whole picture of his treatment by his fellow police officers.

A motion to suppress was timely made at the outset of the trial and was continued by the court and heard during the course of the trial (the motion to suppress and notice of motion are found in the Clerk's Transcript at pages 32 to 34). The motion to suppress was heard by the court and denied without prejudice. In addition to the motion to suppress, the record is replete with objections to the taking of Stafford's books and papers and the use being made thereof. A particular hearing and evidence was taken in support of the motion to suppress (to be found commencing at page 1289 of the Reporter's Transcript). At that phase of the case, Stafford testified that he had been on the police force since February of 1948; that he had the rank of sergeant and was assigned to Central Vice; and that he was watch commander. He lived with his family in Temple City. He had children–ages 15, 13 and 9. His 9-year-old boy has rheumatoid arthritis and is emotionally disturbed. (R.T. p. 1290) On the morning of March 20, 1964, the boy started for school. He observed that the boy had not gone to school but was playing, and he took the boy to school. He had just let the boy out at the school (St. Luke's in Temple City, California) when Officer Judd came up and said, "Pete, I'm Sergeant Judd. You are a suspect in a personnel investigation. Take everything out of your pockets and get out of the police car." (R.T. p. 1291) He took Exhibits 69 and 70 (the black and brown notebooks) and laid them on the seat of the car; these were his books; he had purchased them;

he had had them; he had had the contents of one of them for three or four years. He took his gun belt off, his gun, his handcuffs and ammunition and laid these items on the seat. He also laid on the seat his badge and identification cards. Lt. Hill approached. Hill searched him. Stafford did not consent to the search. Stafford was told to get in the back of the police car and to get on the prisoner's side (the right rear side). (R.T. p. 1293) This he did. Other officers got in–Lt. Devin and Capt. Nelson. They then drove him to the Sunny Cal Motel at 225 West Valley Boulevard in South San Gabriel, outside the city limits of Los Angeles. [Note: This was in violation of the rule in *People v. Martin,* 225 A.C.A. 121.] This was about 8:20 to 8:30 in the morning. When he arrived at the motel, there were three or four policemen there; Sgt. Zabel was one of them and Sgt. Briggs, Sgt. Judd, Lt. Hill, Lt. Devin and Capt. Nelson. After they arrived in the room, Hill told Stafford, "Remove your clothing." He removed his coat and shirt and trousers, and then Hill said, "Take all your clothes off." Stafford replied, "I don't want to take my shorts off." Hill stated,"*I am ordering you as a Lieutenant of Police to either take your shorts off or I'll tear them off of you.*" (Our emphasis.) (R.T. p. 1295) Stafford then removed his shorts; he was in the nude. He stood there for a minute or two and was then told to bend over and spread his buttock. He did this. Hill got down and looked up his rectum. Hill then examined his private parts, told him to lift his scrotum up. Hill then told him to put his clothes back on. At no time did they show Stafford a warrant of arrest or a search warrant. At no time did they advise Stafford of his constitutional rights; that he was entitled to talk to a lawyer or consult with a lawyer or obtain the services of a lawyer.

After Stafford was dressed, Captain Nelson talked with him. Periodically throughout the time in the motel they asked him questions. [The Court of Appeal was in error in its estimate of time – Appendix "A" p. 10.] Stafford was at the motel until 1:30 in the afternoon. He asked permission to go to the rest room and was told to keep the door open. One of the officers walked with him into the lavatory. Stafford had made no effort at any time to leave the building. (R.T. pp. 1297, 1298) Stafford suffers from a physical infirmity–he has to eat often; he has trouble with his pancreas. Around one o'clock they brought him a cheese sandwich. About two o'clock they took him to the police building, to an interrogation room. He was told to look at a wall and not to turn his head. He was kept there from 2:00 until 5:00 or 6:00. Sometimes two and three officers were there. (R.T. pp. 1298-1300) He was questioned by Lt. Sporrer. He was questioned later that evening, for an hour or so, by Inspector Collins and Sgt. Arnold. They had a stenographer there. At no time was he advised of his constitutional rights. (R.T. p. 1301) At no time was he advised that he had a right to remain silent. They told him that if he refused to answer, he would be charged with insubordination. (R.T. p. 1302) He was driven home by Lt. Hill and Sgt. Zabel, about 1:00 a.m. the morning of the 21st. (R.T. p. 1302) They searched his car and his garage. He told them no, but they searched it anyway. When he objected, they said, "That's too bad. We're going to search it anyhow. What do you think of that?" (R.T. 1302) They searched the car and removed something. He knew that if he did not answer the questions put to him that day by the officers, he would be disciplined; he felt that the consequences of discipline under those circumstances

would be dismissal. (R.T. p. 1312) He knew that he could be fired for insubordination. (R.T. p. 1313)

At this point in the trial, reference was made to the entry into evidence of Exhibits 3 (DeMaddalena's notebook), 69 and 70 (Stafford's notebooks). Objection was made that these exhibits were obtained in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Article I, Section 19, of the California Constitution; and in violation of the rules laid down in *People v. Cahan,* 44 Cal.2d 434; *Escobedo v. Illinois,* 378 U.S. 478; *Massiah v. United States,* 377 U.S. 201; and *People v. Dorado,* 62 Cal.2d 338. The trial court was then referred to the case of *People v. Perez*, which had just been decided by the Second Appellate District of the State of California, and also the case of *People v. Collins,* decided by the Fourth Appellate District of the State of California. (R.T. p. 1314) The trial court's attention was called to the fact that *Collins* was a recent case, not at that time reported, and that *Perez* was not reported; that both cases had resulted in reversals because the men involved had not been advised of their constitutional rights. (R.T. p. 1314)

The conduct of the police officers in taking this man from a schoolyard, without a warrant of arrest, without a search warrant, and proceeding to take him out of the City of Los Angeles to an isolated motel and there to search him, to compel him to disrobe, and Lt. Hill then to compel him, in his nude state, to bend over and have his rectum examined, *is an outrage – a violation of the man's civil rights. This was a form of compulsion.* This man was told that if he did not answer questions, he would be disciplined. He knew that meant discharge. While he was in the room at the motel, his books and

papers were taken from him, and repeatedly throughout the trial of this matter this evidence was used against him. [Note: At this point we wish only to deal with the compulsion used upon Stafford to compel him to testify, and under point II we will discuss the illegal search and seizure and the use of the fruits thereof at the trial.]

Subsequent to the foregoing testimony, Stafford testified on the limited issue of the voluntariness of his statements before the grand jury.

Prior to testifying before the grand jury (and he believed it was the beginning of the second week in April of 1964) Captain Mills had called him to his office, together with Sgt. Phelps, Lt. Ingram and Officer Burke, and they had all been given subpoenas. (R.T. p. 2305) At that time Captain Mills (Commander of the Division of Internal Affairs) stated, "You know that you are police officers and that you cannot take the Fifth Amendment. . . . If you do take the Fifth Amendment, you'll be fired. You understand that, don't you?" And Captain Mills then nodded to each of them. (R.T. p. 2306) Stafford next had a conversation with Lt. Sporrer with reference to appearing before the grand jury. This was about March 24, 1964, in the interrogation room of the police building. He was being questioned at that time by Sgt. Arnold (attached to Intelligence Division), Lt. Sporrer (Arnold's superior officer) and Captain Mills. Lt. Sporrer said, with reference to the grand jury, "You know, Pete, you can't take the Fifth Amendment, being a policeman, if you go before the grand jury, or you'll be fired." (R.T. pp. 2306, 2307) He went before the grand jury because he did not want to lose his job; he had a trial board pending, in fact, at that time there were not any charges even brought against him. He had

been on the police force almost 17 years and did not want to lose the job and the $400 per month pension for the rest of his life a few years hence. (R.T. p. 2307)

On cross-examination Stafford stated that Captain Mills said to them, "You know, as policemen you can't take the Fifth Amendment or you'll be fired." (R.T. p. 2308) Stafford's attention was then directed to his testimony given before the grand jury wherein he was advised by the prosecutor that he might be indicted, was asked if he had talked with his attorney, and was advised that he did not have to testify if he did not want to (R.T. p. 2310); and it was then brought to Stafford's attention that at that time he had stated that he was not being forced to testify (R.T. p. 2311). On redirect examination it was brought out that Stafford's state of mind at that time was that he knew if he refused to testify he would be fired. In the grand jury room he was not permitted to have a lawyer present; the proceedings there were secret; and the only persons present at the time these proceedings took place were members of the grand jury, the prosecutor and himself. (R.T. p. 2314)

Stafford was then cross-examined with reference to other testimony he had given before the grand jury.

He was questioned about his testimony before the grand jury with reference to the telephone number DUnkirk 3-1049 and a slip of paper he had found outside of the Rex Billiard Hall. (R.T. 2326) There were three numbers; he did not obtain these numbers from Canard; he put them near Canard's name for association; he knew Canard as a gambler more than as a bookmaker; he knew Canard hung around the Crown Hill area (Third and Bixel Streets, Los Angeles) and four or five

other people hung around there and there was some bookmaking going on there, but who was the bookmaker per se he really did not know; he thought Canard either had knowledge or might have something to do with it. (R.T. p. 2328) When an informer gave him the number NOrmandie 2-1649 he put that by Canard's name, because the informer said that this man hung around the Crown Hill area. (R.T. p. 2328) Exhibit 69, tag No. 2, an entry "Emmett Canard," the number there was Canard's home phone, DUnkirk 9-2060; then Canard had changed his number to DUnkirk 9-0888; another number, HU 3-9373, was given to him by an officer who said this was the Pink Pony Bar; it was next to Canard's name as one of the officers had seen Canard come out of there. (R.T. p. 2330) Once Canard had asked him about how to transfer a pool hall license and he had directed Canard to Sgt. Phelps. (R.T. pp. 2333, 2334) Regarding some testimony he had given to the grand jury (to the effect that Myers was reputed to have been the money behind some gambling and "I couldn't come out and say that he was bookmaking, because I never myself ever saw him take a bet . . . it is more than a rumor. It has been known that he [Myers] does back some bookmaking in a financial way") over objection he stated that he had so testified.

Further with reference to petitioner Stafford's testimony before the grand jury, he testified that he had been served with a subpoena about April 14th or 15th while in Capt. Mills' office with Sgt. Phelps, Lt. Ingram, and Officer Burke. (R.T. p. 2454) Capt. Mills handed a subpoena to him and said, "I'm ordering you to testify before the grand jury. Here is your subpoena. If you don't testify, you know that it means dismissal." (R.T. pp. 2454, 2455) He understood what Capt. Mills

meant; that it meant dismissal if he did not testify. He understood that when he appeared before the grand jury. He knew that an officer had to appear before the grand jury. No one connected with the grand jury or the District Attorney's office had told him that he did not have to appear before the grand jury. (R.T. p. 2455) Before going before the grand jury he talked with Lt. Sporrer about appearing before the grand jury. Sporrer had interrogated him about the 24th of March in one of the interrogation rooms in Internal Affairs. He knew at that time that Lt. Sporrer was a lieutenant of police. Sporrer at that time said, in substance, "You know, Pete, that a policeman can't take the Fifth Amendment. You are going to have to testify before the grand jury." Sporrer said, "You know you can't refuse to testify. If you do, it means dismissal." (R.T. p. 2456) When he appeared before the grand jury and Mr. Busch (of the District Attorney's office) had made the statement to him [i.e., that he might be indicted and that he did not have to testify if he did not want to], he was frightened; he knew he had to testify; he could not refuse to testify or he would be dismissed from the force; there was no choice; he had to testify; he had had the experience at the motel on March 20th; he had substantial pension rights; he had a little over three years to go for a full pension for the remainder of his life. (R.T. p. 2457) He was not told by anybody before the grand jury that he could get up and walk out and did not have to testify. He did not understand that he had the right to walk out and not testify. He thought he could not take the Fifth Amendment; he knew he had to answer the questions, otherwise he was subject to dismissal from the police force. That he could not take the Fifth Amendment he thought to be a rule of the Police Department. He did not voluntarily go

before the grand jury. He was given the subpoena and was instructed by Capt. Mills. He did not ask permission to enter the grand jury room and testify. He was actually called into the grand jury room by the bailiff at the grand jury proceedings; he was sworn to testify; and they proceeded to question him. (R.T. p. 2458) His attorney was not in the grand jury room and was not nearby; he did not know where his attorney was at the time.

May we point out that the record is completely silent as to any police officer of the City of Los Angeles denying the testimony of Stafford to the effect that he had to testify and that if he did not testify, or should he take the Fifth Amendment, he would be discharged.

Captain Mills testified (R.T. pp. 949-950), in effect, that he was a Captain of the Los Angeles Police Department, Commander of Internal Affairs, with complete authority delegated to him by Chief Parker in disciplinary matters. He recalled that prior to the hearing before the grand jury Sgt. Stafford, Sgt. Phelps, Officer Burke and Lt. Ingram were in his office. He was not certain if they were subpoenaed there. He might have told them that if they took the Fifth Amendment and refused to testify before the grand jury there was a rule in the Police Department that they well could be suspended or their services terminated, or words to that effect. (R.T. p. 971) This was a rule of the Police Department at the time –they do not have to testify, but if they chose not to testify, they do not have to be members of the Police Department; in other words, it was grounds for termination or suspension of their services. (R.T. p. 971)

We respectfully call the Court's attention to the Official

Reporter's Transcript at page 2299 where there was considerable discussion about the District Attorney cross-examining Mr. Stafford regarding his testimony before the grand jury. At that time we contended, and advised the court fully as to our position on this particular matter, that both Lt. Sporrer and Captain Mills had said to defendant Stafford, "If you go before the grand jury and take the Fifth Amendment, you are subject to discipline and discharge"; further, that Stafford believed that he would be discharged if he did not testify; and so, therefore, under compulsion and by reason of the treatment which had been accorded him when he was picked up at the schoolyard and interrogated at the motel and through the night, Stafford believed that he had to testify in order to save his job, that he felt at that time that he had a reasonable chance of saving his job, and that, for this reason, he did testify.

As was said in *People v. Underwood*, 61 Cal.2d 113, at 121:

> "Before confessions or admissions may be used against the defendant, the prosecution has the burden of showing that they were voluntary and not the result of any form of compulsion or reward."

Underwood cites a number of cases.

Concerning his testimony before the grand jury wherein Stafford stated that he was not being forced to testify, in reply to counsel's question, Stafford stated:

> "Q [By Mr. Parsons] Were you still of the same opinion -- what was your state of mind even after Mr. Busch had advised you as he apparently did?

"A [By Stafford] Well, I knew that if I refused to testify I'd be fired." (R.T. p. 2314)

The trial court denied our objection that Stafford was under any compulsion. (R.T. pp. 2316-2317) The court then instructed the jury that any examination of Mr. Stafford was only for the purpose of testing his credibility and it was not to be considered by them as against Mr. Canard. (R.T. pp. 2323-2324)

Again at pages 2325-2326 and at page 2341 of the Reporter's Transcript, Stafford's attention was directed to testimony given before the grand jury. He was questioned concerning his meeting at the Westward Ho Restaurant with Adler, Myers and DeMaddalena. (R.T. pp. 2343-2344) Then, after our objection, the court spoke up and said:

> "As to whether or not the testimony that Mr. Stafford gave in connection with certain of these matters in cross-examination is impeaching by the testimony previously given before the Grand Jury, that is a matter for argument of counsel, and the jury will have to make the determination finally as to whether there was or was not impeachment." (R.T. p. 2344)

Again Stafford was questioned (see R.T. p. 2361) by the District Attorney about an entry which says, "Make meet with Cy, Maury and Hank." Stafford was required to explain that. See also page 656 of the testimony before the grand jury as quoted to Mr. Stafford at page 2361 of the Reporter's Transcript. Notwithstanding our objection, Stafford was questioned about the testimony regarding "Make meet with Cy, Maury and Hank.".

The Court of Appeal, on the final page of its opinion (Appendix "A" p. 31), said:

> "Manifestly, the use of the grand jury testimony had little, if any, impeaching effect (as the defense was quick to point out at the time the prosecution sought to employ it)."

The Court of Appeal goes on to say:

> "If *Garrity* . . . applies, retroactively, . . . the trial court was in error in permitting the prosecution to use Stafford's grand jury testimony in impeaching him."

The Court of Appeal then says:

> " . . . *assuming that error was committed, it was not prejudicial.*" (Emphasis ours.)

How can they possibly reason that way? This was highly prejudicial. Stafford's very testimony was questioned, and argument was made to the jury that he had told, in effect, two different stories. Certainly it was prejudicial – highly prejudicial. If it was not prejudicial, why did the prosecution use it; no skilled prosecutor would jeopardize his case unless he thought he was dealing a hard blow.

As an example of this, the prosecutor, in his final argument, read to the trial jury some of Stafford's testimony before the grand jury. (R.T. pp. 3248-3249) That this impressed the jury is established by the fact that on May 19, 1965, the foreman of the jury (R.T. p. 3263) asked to have Stafford's grand jury testimony read to the jury. A portion of the testimony read to the jury is found on pages 3269 through 3276 of the Reporter's Transcript. This was done just before the jury reached a verdict of guilty.

There can be no question that the use of the grand jury

testimony was prejudicial.

We respectfully urge that *Garrity v. New Jersey* (1967) 385 U.S. 493, 17 L.Ed.2d 562, is ample authority for our position that this testimony before the grand jury, and the basis for the cross-examination, was obtained from petitioner Stafford under compulsion. This plan and scheme of compulsion was started at the very time Stafford was picked up at the schoolyard delivering his young son to school.

We respectfully urge that *Garrity, supra,* is ample authority for the granting of a hearing by this Court and a reversal of this case.

As was said in *Garrity*:

> "The choice imposed on appellants was one between self-incrimination or job forfeiture. Coercion that vitiates a confession under *Chambers v. Florida,* 309 U.S. 227, and related cases can be 'mental as well as physical'; 'the blood of the accused is not the only hallmark of an unconstitutional inquisition.' *Blackburn v. Alabama,* 361 U.S. 199, 206. Subtle pressure (*Lyra v. Denno,* 347 U.S. 556; *Haynes v. Washington,* 373 U.S. 503) may be as telling as coarse and vulgar ones. The question is whether the accused was deprived of his 'free choice to admit, to deny, or to refuse to answer.' *Lisenba v. California,* 314 U.S. 219, 241."

II

Petitioner Stafford Was Denied A Fair Trial And Due Process, In Violation Of The Fourteenth Amendment To The United States Constitution, By Reason Of His Detention And Unlawful Search And The Use Of The Fruits Thereof At The Trial. The Search Was In Violation Of The Fourth And Fifth Amendments To The United States Constitution And Article I, Section 19, Of The Constitution Of The State Of California.

As has been stated, a timely motion to suppress was made at the outset of the trial and was continued by the trial court to be heard during the course of the trial. (Motion and notice–C.T. pp. 32-34) The motion to suppress was heard by the court and denied without prejudice. In addition to the motion to suppress, the record is replete with objections made to the taking of Stafford's books and papers and the use being made thereof.

Objections were made to the entry into evidence of Exhibits 3 (DeMaddalena's notebook), 69 and 70 (Stafford's notebooks), the objections being that these books were obtained in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 19, of the California Constitution, and in violation of the rules laid down in *People v. Cahan, supra,* 44 Cal. 434, *Escobedo v. Illinois, supra,* 378 U.S. 478, *Massiah v. United States,* 377 U.S. 201, and *People v. Dorado, supra,* 62 Cal.2d 338. The defense then referred to other recent California cases.

The conduct of the police officers toward Stafford–seizing him in a schoolyard, without benefit of a warrant of arrest or

reasonable cause or a search warrant, taking him out of the city of Los Angeles to a motel, there keeping him a prisoner and forcing him to disrobe, and then examining his private parts–we repeat–*is an outrage and a violation of a man's civil rights.* It was done for only one purpose: to break this man down. It was a part of their plan of compulsion, further exemplified by their instructing him that he could not avoid going before the grand jury and testifying, that he could not take the Fifth Amendment, and that if he did so he would be discharged.

The law is now well settled in both the United States and California with reference to search and seizure, and is laid down in the basic case of *People v. Cahan, supra,* which was approved in *Elkins v. United States,* 364 U.S. 206, 80 S.Ct. 1437, 1439.

It is our contention that Stafford was under arrest the minute he was ordered out of the car and taken to the motel. In fact, while in the schoolyard, he was told to sit in the rear of the car in the "prisoner's seat," which is the right rear side of the car. As was pointed out in *Henry v. United States,* 368 U.S. 98:

> "An arrest takes place the minute his liberty is restricted."

It is our contention that, without question, since *Mapp v. Ohio,* 367 U.S. 643, which is supported by *Malloy v. Hogan,* 378 U.S. 1, the states are bound by the federal rules and the United States Constitution. Our California state courts must follow the exclusionary rule.

As was said in *Mapp v. Ohio, supra:*

> "Today we once again examine Wolf's constitutional documentation of the right to privacy, free from unreasonable state intrusion, and after a dozen years

> on our books are led by it to close the only court-room door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right reserved to all persons as a specific guarantee against that very same unlawful conduct."

We contend that all evidence by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court. We further contend that the search conducted after the arrest, or detention, or whatever you may call it, of Stafford and taking him to the motel was too remote. It was purely an exploratory search, for the purpose of degrading Stafford, and was a form of compulsion to break him down in the hope that he might say something and would later admit something, if there was anything to be admitted.

People v. Mills, 148 C.A.2d 392, covers the law quite fully in this regard, with reference to exploratory searches, and cites as authority *United States v. Rabinowitz,* 339 U.S. 56.

Subsidiary to the principal question of search and seizure is the question of whether or not there was a voluntary consent given by Stafford. The facts of this case belie any such consent. Stafford denied that there was any consent, and the court's have repeatedly held that consent to a search must be free and voluntary and not as a result of compulsion; otherwise, it will not be regarded as consent. (See *People v. Michael,* 45 Cal.2d 751; *United States v. DiRe,* 332 U.S. 581; also *People v. Haven,* 59 Cal.2d 713.)

III

The Trial Court Erred In Denying A Mistrial When Officer Gunn Testified That In A Conversation With DeMaddalena About Stafford And Stafford's Access To "Muscle"–Setting Up Individuals For A Working Over–He Had Asked If Lipowitz, A Bookmaker, Was One Of The Persons And DeMaddalena Had Replied Yes, And The Resulting Unfavorable Publicity In The Press And On Television News.

This episode, which we contend was highly prejudicial and could not be cured by any instruction or the instruction which the trial court gave, was precipitated by Officer Gunn in testifying regarding a conversation with DeMaddalena. Gunn continually put words in DeMaddalena's mouth, throughout his questioning of DeMaddalena, in the hope that he could set up something. For instance:

> "I asked DeMaddalena if he wasn't afraid of Stafford because he had planned to cut Stafford out of the operation when he [Stafford] left Central Vice. And DeMaddalena stated that even though Stafford was supposed to be a mean guy he thought that he could handle him. He told me that Stafford had access to muscle and had set up several individuals in the past for a working over. I asked him if one of these individuals was a bookmaker named Lipowitz, and he stated yes, that Stafford had set him up for a working over with a baseball bat.
>
> "MR. PARSONS: I move to strike it as immaterial, irrelevant and incompetent to any issue in this

case.

"THE COURT: The motion to strike is denied." (R.T. pp. 359, 360)

May we point out that in the opinion filed by the Court of Appeal (Appendix "A" p. 23) the court said, referring to this testimony:

"This testimony was elicited without objection. After it had been received, a motion to strike was denied. However, later in the trial—on May 3, 1965—the court granted defense motions to strike it."

May we further point out that the testimony was elicited in such a manner that little or no opportunity was afforded to object; but as soon as was possible, counsel for petitioner Stafford moved to strike it, and the trial court, as has been shown above, promptly denied the motion.

Not all of the newspaper and television publicity about which we complain related to the aforesaid Lipowitz incident, but all of the following were given community-wide circulation, and they were in the leading Los Angeles newspapers or over local TV channels and, of necessity, must have prejudiced the trial of these petitioners.

Numerous newspaper articles were offered in evidence to establish our contention on this point. One of them was headed: "POLICEMAN NAMED IN BOOKIE PAYOFF." "EX OFFICER TELLS JURORS OF DEALS." "EX OFFICER SAID WHAT HE WAS SUPPOSED TO DO FOR THE MONEY WAS TO KEEP THE HEAT OFF OF AN ALLEGED BOOKMAKING SHOP CALLED 'THE TAXI DRIVERS' SOCIAL CLUB' AT THIRD AND LUCAS." (R.T. 901-903)

A motion was then made asking the court to poll the jury to ascertain who, if anybody, had read the articles. (R.T. 903-

904) The motion was denied.

Then an article appeared in one of the Los Angeles papers, to which the trial court's attention was directed, headed: "BIZARRE TALE OF BOOKIE'S REVENGE," and then in large type "BRUTAL BEATING OVER A $2 BET." This article was for sale at the newsstand in front of the Hall of Justice (in which building the matter was being tried). The article was to the effect that Stafford had one Lipowitz beaten up with a baseball bat. The testimony which sparked this publicity was elicited deliberately by the prosecution. (R.T. pp. 997-998) In the article it was stated that "Lipowitz carries the scar and trauma of the baseball bat and lead pipe beating about his head." (R.T. pp. 996-998)

A motion was then made for a mistrial (R.T. p. 998) and promptly denied.

It then appeared that Lipowitz was in the courtroom, and defense counsel asked permission to address the court, after which Lipowitz was ordered out of the courtroom. (R.T. pp. 1005-1008)

Again a motion was made to poll the jury, and again the motion was denied. (R.T. p. 1011)

TV programs given in Los Angeles were offered in evidence (Defendants' Exhibits R and S), and a motion for new trial was again made and again denied.

Many articles of a similar nature were offered in evidence—Defendants' Exhibit U. (R.T. pp. 2102-2103)

On April 23, 1965, at 5:00 p.m., the following occurred on a Los Angeles television news program, accompanied with close-up shots:

> "BAXTER WARD: This next item, coming up in a moment, is a shocker, and it's actually in two

parts, half now and half in our news later. We'll get to it after a word for American Home.

"(At this point commercial intervened.)

"A man that's figured prominently in the police-bookie ring trial of a fired Vice Squad sergeant, Sergeant Peter Stafford, is Sol Lipowitz on the right. Testimony already brought out information that Stafford had access to 'muscle' (they call it), and had marked Lipowitz, among others, for a working over. Sue Lipowitz spoke today of her husband's beating:

"SUE LIPOWITZ: Well, I went to the trial today. I wanted to see Peter Stafford. I wanted to see what a man looked like, an officer of the law, that could do such a thing as that. I just couldn't imagine that, - - all this time I had thought that it was gangsters and hoodlums. I had had no idea in the world that the police figured into it, because, during the time of this supposed investigation, I cooperated with them. I talked to them, and I had no idea that . . . .

"VINCE WILLIAMS (Interviewer): To be brief, Sue, exactly what did Peter [Stafford] do?

"SUE LIPOWITZ: Well, from the testimony that his fellow officers gave, Peter Stafford is the one who had Sol taken care of, so to speak . . . . "

In our Opening Brief before the Court of Appeal, we cited the case of *Sheppard v. Maxwell,* 384 U.S. 333, and quoted extensively therefrom (Opening Brief pp. 55-57), but the learned Court of Appeal disagreed with us (Appendix "A" pp. 24-25). With this we cannot agree. The adverse publicity

in *Sheppard,* while indeed damaging, pales into insignificance, in our opinion, when compared with the damning language used here.

At this point, may we take the liberty of excerpting from the *Sheppard* case a few of the profound observations of this Honorable Court:

> "But the Court has also pointed out that '[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.' "
>
> " . . . [W]e did not consider dispositive the statement of each juror 'that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles.' "
>
> "The undeviating rule of this Court was expressed by Mr. Justice Holmes over half a century ago in *Patterson v. Colorado,* 205 U.S. 454, 462 (1907):
>
> " 'The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.' "
>
> "Only last Term in *Estes v. Texas,* 381 U.S. 532 (1965), we set aside a conviction despite the absence of any showing of prejudice. We said there:
>
> " 'It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused.

> Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.' At 542-543.
>
> "And we cited with approval the language of Mr. Justice Black for the Court in *In re Murchison*, 349 U.S. 133, 136 (1955), that 'our system of law has always endeavored to prevent even the probability of unfairness.' "

IV

The Interception Of A Telephone Call Between Officer Gunn And Sgt. Stafford And The Use Of The Recording Of The Conversation Was In Violation Of The Fourth, Fifth And Sixth Amendments To The United States Constitution And 28 U.S.C. 605, The Federal Communications Act.

(There are numerous other interceptions which we complain of, which were subsidiary to this and which will be treated in this argument.)

The Chief of Police of the City of Los Angeles, the late William H. Parker, testified that there were numerous telephones throughout the Police Department which went through the City Hall switchboard. Also, there were some franchise phones that were direct and there were private telephones for the private business of the employees of the Police Department. Employees were not supposed to use the city phones for their private business. Chief Parker authorized the interception of the phones in Central Vice, so that they could record the conversations that

were taking place over these phones. (R.T. p. 55)

The record does not disclose permission by any city official except Chief Parker to intercept any telephone calls, nor any permission from the telephone company itself.

In addition to this, Officer Gunn testified that he had equipment on his phone to record conversations. He consented to have his phone monitored. He had a Revere tape recorder with an induction coil that went from the tape recorder to the telephone. He and his wife were given instructions on how to operate this equipment. (R.T. p. 242)

The recorded conversations used as evidence in this trial are as follows:

1. February 29, 1964 (transcript, People's 4; tape, People's 5) between Officer Gunn and DeMaddalena (R.T. pp. 266-272).

2. March 12, 1964 (transcript, People's 7; tape, People's 8) between Officer Gunn and Peter Stafford (R.T. pp. 292-294; Appendix "A" pp. 6-7).

3. March 12, 1964 (transcript, People's 9; tape, People's 10) between Officer Gunn and DeMaddalena (R.T. p. 306).

4. March 16, 1964 (transcript, People's 11; tape, People's 12) between Officer Gunn and DeMaddalena (R.T. pp. 328-332).

5. March 16, 1964 [by means of an electronic device worn by Officer Gunn] (transcript, People's 14; tape, People's 15) between Officer Gunn and DeMaddalena.

6. March 20, 1964 :

Officer Gunn to DUnkirk 7-1191 (transcript, People's 16)

Officer Gunn to SP 2-1623 (transcript, People's 17)

Officer Gunn to FR 1-6591 (transcript, People's 18) (Tape on these conversations, People's 19) (Appendix "A" pp. 11-17)

7. March 13, 1964 (transcript, People's 56; tape, People's 58) Stafford to dispatcher's office (R.T. pp. 1153-1154; Appendix "A" pp. 9-10).

8. March 13, 1964 (transcript, People's 57; tape, People's 59) Stafford to Motor Vehicle Department (R.T. p. 1151; Appendix "A" pp. 8-9).

Conversations 1, 2, 3, 4, 5 and 6 above were identified by Sgt. Jack William Herron, and conversations 7 and 8 were identified by Officer Jack Briggs. Sgt. Herron admitted that a very sensitive microphone was attached to the telephone itself; that it was activated by electrical current, an induction coil was attached to the telephone itself and to a tape recorder (R.T. pp. 321-322). Officer Briggs stated that in March of 1964 he received an assignment to monitor telephone conversations, extensions were put in the office of Internal Affairs by the telephone company. Extensions were connected with Central Vice. There is a box with phone wire leading to the instrument; there are screws acting as terminals and they attached two lead wires to two of the screws. They then plugged in to a Revere tape recorder. This had a telephone on it and they could pick up the conversations. They had to activate the machine by pushing a button, and this started the recording tape. The device then ran the sound to the tape recorder and they could hear it through the earphones or through the speaker of the phone being used. The minute someone in Central Vice picked up a phone and started to dial they could hear it. This was done pursuant to orders of Captain Mills. (R.T. 1062-1063) Officer Briggs stated that at the time he was listening and recording conversa-

tions he did not inform any of the parties that he was listening. He did not inform Sgt. Stafford that he was intercepting or about to record the telephone messages. He did not inform the person on the other end of the telephone that the message was to be intercepted and recorded. (R.T. p. 1070) The officer admitted that after the first interception, by going into the black box and effecting a connection, he monitored from 150 to 200 telephone calls. He never specifically at any time had permission from Sgt. Stafford to monitor any of these phone calls, nor permission of any person who originated the call, nor the person who received it. (R.T. p. 1080)

Objection was repeatedly made that these transcripts and tapes were obtained in violation of the Fourth, Fifth and Sixth Amendments and amounted to a denial of due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

We respectfully direct this Court's attention to the case of *Berger v. New York* (Oct. Term. 1966), 388 U.S. 41, in which there is a fair and complete discussion of eavesdropping on telephone calls.

The subject of eavesdropping and our objections thereto was fully covered in our Opening Brief before the Court of Appeal of the State of California, beginning at page 58, and supplemented in our Supplemental Brief before said Court of Appeal.

V

The Evidence Was Insufficient To Sustain The Judgment Of Guilty As To Count I As To Any Of The Petitioners.

We contend that no conspiracy was established.

As was stated in *People v. Samarjian,* 240 Cal.App.2d 13, quoting Miller, *Criminal Law* (1934) Sec. 32, p. 108, in footnote 2 at page 17:

> " 'It is essential to constitute the crime of conspiracy that there be an agreement or understanding between two or more persons that they shall act together. It is not necessary that the agreement shall be a formal one. It is sufficient if the minds of the parties meet understandingly, so as to bring about an intelligent and deliberate agreement. However, there can be no conspiracy without such an agreement, as neither the fact that two persons at the same time intend to do the same or similar act, nor the fact that one knows of the intention of another to do a particular act, . . . is sufficient for a conspiracy.' "

We believe that the evidence fell far short of establishing an agreement.

The use of a conspiracy charge has been repeatedly condemned by the courts. See *Krulewitch v. United States,* 336 U.S. 440, wherein it refers to the condemnation of its widespread use as shown by a report of the Attorney General of the United States. As was said in *Krulewitch:*

> "When the trial starts the accused feels the full impact of the conspiracy strategy. In other

> words, the conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction. [Citing cases]"

The statements in *Krulewitch* are recognized by learned writers throughout the country, and here in California by Witkin in his work on *California Crimes,* Vol. 1, at page 102, where he makes the following statement and supports same by the foregoing quote from *Krulewitch:*

> "The conspiracy charge is a powerful prosecutor's weapon in cases where proof of the elements of the substantive crimes is weak, and it also makes admissible in a single trial the acts and declarations of each of the conspirators. . . . It has been argued, however, that the procedural and substantive flexibility of conspiracy prosecutions involve serious danger of unfairness to the defendant, and that their use should be curtailed."

In the instant case, a great mass of evidence was introduced, largely based on discussions between Gunn and DeMaddalena. There was much testimony about the activities of the police department, including the monitoring of hundreds of telephone calls, but, as we have respectfully asked throughout: Where is the evidence of an agreement (which is the essential part of a conspiracy)?

VI
ALLEGED "PROTECTED" NUMBERS

We contend it was prejudicial error by the trial court to deny to the defense the right to introduce in evidence the disposition of those cases in which arrests were made for alleged violations of Section 337a of the California Penal Code.

On March 20, 1964, various officers of the Los Angeles Police Department raided so-called "protected" numbers or locations. Much testimony was devoted to the arrangements for these raids, testimony of the officers conducting the raids, and testimony of some of the persons arrested at the so-called "protected" locations, but only in one instance was the final disposition of the matter given, the jury being told that the case against Emmett "Tommy" Canard had been dismissed. In our Closing Brief filed with the Court of Appeal of the State of California, Second Appellate District, we discussed with particularity the numbers that were inferred as being "protected." It was and is our contention that it was material to the defense to show to the jury what occurred after these numerous arrests, what the final dispositions were, so that the jury could determine fairly whether or not bookmaking was being conducted at these so-called "protected" locations or numbers. All the jury had before it, with the one exception of Canard, was the bare fact that arrests were made or that examinations were made at certain locations by the officers. It is our contention that the jury could have been left with only one inference: that, with the exception of Canard, "the fair inference was that [these locations] were . . . protected" (the quoted words have been borrowed from the Respondent's

Brief filed with the Court of Appeal, page 81 thereof).

During the March 20, 1964 raids, of a total of some 17 so-called "protected" numbers, arrests were made at the following:

1. DUnkirk 9-0888, 250 S. Reno St. - Emmett "Tommy" Canard. Found at this location - blank pad and adding machine.

2. DUnkirk 3-1049, 427 Grandview - Leo Luciano. No evidence of bookmaking found. Luciano had never heard of Stafford, had never seen Stafford.

3. MAdison 6-4572, 215 W. Fifth St. - Pat Locricchio. (Only a portion of this number was in Stafford's notebook.) Locricchio testified she did not know Stafford and was not being protected.

4. DUnkirk 4-0702, 228 S. Lake St. - Roger Matthews. (Complete number not in Stafford's notebook.) Matthews testified he did not know Stafford.

5. MAdison 5-8311, 935 Sun Mun Way - Jimmy Wong. No evidence of bookmaking found. Wong testified he did not know Stafford and was not being protected.

6. CA 5-3423, 5043 Huntington Dr. North - Sammy Wong. No evidence of bookmaking found. Wong testified he did not know Stafford and was not being protected.

Four other arrests were made on March the 20th, involving PL 9-0292, PL 9-2705, DU 2-1998, PL 0-3578. These phone numbers, we believe, could not, under any stretch of the imagination be deemed protected numbers. PL 9-0292 was in the handwriting of the clerk in the Vice Squad office, a Mrs. Welsher. PL 9-2705 was a number that Administrative Vice had on file. Concerning DU 2-1998, Officer Wyatt testified (R.T. p. 2505) that he and Sgt. Stafford had checked this location as far back as

1962; Stafford also testified about DU 2-1998 (R.T. p. 2419). PL 0-3578, not contended as having been protected so far as we can learn from the record, had particular significance because it was found in Stafford's notebook after his arrest.

We were denied an opportunity to show the disposition of these various cases, which we believe we had a right to do. This came under the heading of "Curative Admissibility in Criminal Cases," see Witkin, *California Evidence,* page 1174.

CONCLUSION

All of the points raised herein, including all federal issues, were plainly raised throughout the trial and again reiterated in the briefs before the Court of Appeal of the State of California and in the petition to the Supreme Court of California for a hearing. Although *Garrity v. New Jersey, supra,* 385 U.S. 493, was brought to the attention of the Court of Appeal, since *Garrity* and since our proceedings before the Court of Appeal, we have learned of *Uniformed Sanitation Men's Association, Inc. v. Commissioner of Sanitation of New York,* 36 U.S.Law Week 3304, 3308 (lower court citation 383 F.2d 364), and *Gardner v. Broderick, Police Commissioner,* 36 U.S. Law Week 3304 (lower court citation 20 N.Y.2d 227). These cases are on all fours with our contention that requiring petitioner Stafford to testify before the grand jury or lose his job was a violation of his rights under the Fifth Amendment.

In the *Gardner* case, Gardner, a police officer, was required to answer questions before the grand jury and sign a waiver of immunity. Upon his refusal, he was discharged and the discharge upheld by the United States Circuit Court of Appeals.

In the *Uniformed Sanitation* case, the Appellate Court

of New York held that the discharge of employees in the sanitation department was proper in view of their refusal to answer questions on the ground of self-incrimination and refusal to sign waiver of immunity.

This Honorable Court, in granting certiorari, at least indicated that the lower court decisions in the *Gardner* and *Uniformed Sanitation* cases will be reviewed. We suggest that these cases are some substantial authority for granting certiorari in the instant case.

In the *Uniformed Sanitation* case, the Commissioner of Sanitation had even obtained a court order authorizing him to tap certain telephone lines. No such thing exists in this case.

The Supreme Court has recently acted on an important matter involving Fifth Amendment rights, and the cases of *Marchetti v. United States,* 36 Law Week 4143, and *Grosso v. United States,* 36 Law Week 4150, were reversed. These cases involved the wagering act passed by Congress, requiring those who engaged in the business to apply for a license, pay wagering stamp tax and make periodic reports. This act was held unconstitutional, as compelling self-incrimination in violation of the Fifth Amendment. We contend that these are some authority for our position here, where Stafford was compelled to testify before the grand jury or lose his job, his substantial pension rights, and substantial amounts of money.

In making the points throughout, we have referred to the Reporter's Transcript and have given the pages thereof where the objections were made to the various evidence which we contend was improperly received, referring to authorities cited in the trial court and, of course, in the briefs to the Court of Appeal.

Petition for writ of certiorari, we respectfully pray, should

be granted, to the end that full justice may be done, that the judgments herein be reversed after a full and complete hearing before this Court.

Respectfully submitted,

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FOOTNOTE 1

[1]Peter Stafford, one of the petitioners herein, was a sergeant of the Los Angeles Police Department. Chief of Police William H. Parker testified that he knew Stafford; knew Stafford's reputation in the field of bookmaking; knew that Stafford was utilized for training purposes; and knew that Stafford was considered to know as much or more about bookmaking in the Los Angeles area than any other member of the department, and also as to sports activity. (R.T. p. 62) Stafford was the sergeant in charge of two bookmaking squads of four officers each. The vice squad enforces the laws with reference to gambling, bookmaking, prostitution, alcoholic beverage control violations and other similar type laws. Stafford's duties were to formulate enforcement programs, train his men, supervise their execution, supervise or make proper inquiry into arrests when they were presented, to approve arrests, to review the contents of arrest reports, and to approve their distribution. Stafford had asked to extend his stay on the vice squad; he did so because he was going to college, attempting to get a degree, and on this job he worked days and could go to school and study at night. Captain Gaunt and Inspector Collins had approved the extension of Stafford's tour of duty in Central Vice. (R.T. pp. 91-93) Captain Gaunt testified that he regarded Stafford as a skilled officer in the field of bookmaking. He relied upon Stafford and had confidence in him. He had examined the work of the Central Vice while Stafford was there and had found Stafford to be an outstanding man in his assignments. He had given an excellent rating to the squad's activities when Stafford was there. (R.T. pp. 95, 96) The number of arrests by that squad was considerably above the average for the city. In fact, on a monthly basis, the number of bookmaking arrests made by

Central Vice was the top number of arrests throughout the city. There were fifteen vice squads operating throughout the city. (R.T. pp. 98, 99) Stafford was one of the authors of Exhibit A, a booklet entitled "Operation Bookmaking." This book was used throughout the department; other officers were given the book to instruct by; and it was used in Central Division to indoctrinate new officers and to train uniformed officers. Stafford also lectured at the Police Academy to the trainees and other officers. (R.T. pp. 102-104) Exhibit B had been prepared by Stafford and was likewise used. Stafford was rated excellent.

We will not here repeat the evidence; however, in a few words: Stafford was the sergeant in charge of bookmaking at Central Vice; the number of Stafford's arrests was high, as has been shown. Stafford knew DeMaddalena. Officer Gunn worked with Officer DeMaddalena. Gunn stated that DeMaddalena gave him a $50 bill and told him to watch it, in effect, it was "a big one"; from time to time thereafter Gunn and DeMaddalena talked. According to Gunn, DeMaddalena told him that they were giving protection to some people, that they would get some money, they would be paid $200 once a month, and later DeMaddalena told him that Sgt. Stafford was part of the deal. Altogether, DeMaddalena said he had received some $400 or $450, most of which he gave to Gunn. The evidence showed that on or about the time DeMaddalena gave Gunn $200 (to which Gunn testified), DeMaddalena had borrowed $200 from the credit union. Gunn reported to his superiors and they set up a watch on DeMaddalena and apparently on Stafford. Hundreds of telephone calls were monitored, using police officers and equipment of the department.

The evidence shows that throughout the period DeMadda-

lena was talking to Gunn, who was attempting to make a case, DeMaddalena was drinking excessively—Gunn even reported this to his superiors.

An arrangement was made to have Gunn call Stafford and give Stafford a number, which Gunn did. The conversation was recorded. (Appendix "A" pp. 6, 7) Stafford testified that on receipt of Gunn's call he thought Gunn was double-talking in front of his superiors, that they wanted DeMaddalena and DeMaddalena was out drunk; and he (Stafford) had telephoned a bar frequented by DeMaddalena, attempting to locate DeMaddalena. (R.T. p. 2232) Ralph Dark, a bartender at the Lake Club, testified to having received a call from Stafford on the date in question. (R.T. p. 2557) Stafford denied having notified anybody that there were about to be any arrests. On this occasion, at one of the so-called "protected spots," when the officers arrived, the man at the location readily stated that he was not booking sports action, only horse action. No arrest was made; the man was there; he had not left the establishment; obviously, he had not been notified of an impending raid. This, we feel, negates any contention by the People that Stafford had notified somebody that spots might be searched or arrests made, and that Stafford did exactly as he said—attempted to cover for a fellow officer who he believed was on another drunken spree.

Of the hundreds of calls monitored, only two other calls of Stafford's were introduced in evidence. (See Appendix "A" pp. 8-10) These were introduced in an attempt to show that Stafford had made some inquiry about a police car purportedly seen in the vicinity of Canard's home. In the conduct of police business, Stafford no doubt checked on many automobile numbers. At pages 2255-2258, Stafford explains this call.

In the line of work Stafford was in, it should not be surprising that he was acquainted with known gamblers. He knew Canard. He never received a bribe or gratuity from Canard. To some extent Canard had been an informer for him. (R.T. p. 2179)

Stafford knew Miller. At one time Miller had a publication called the "Post and Paddock." Stafford had investigated Miller. Stafford knew Miller had a reputation of being a gambler. (R.T. p. 2187) Stafford testified that he bought produce at Miller's produce store, but he never received any money from Miller.

Stafford also knew Myers; he knew Myers had a dress shop and had heard rumors that Myers was a gambler. There was an occasion when DeMaddalena and Stafford met Myers and Adler in a well-known Pasadena restaurant (the Westward Ho)–Stafford says by chance and not by appointment. This was the first time Stafford had ever met Mr. Adler. The evidence shows that on this occasion DeMaddalena was drunk. Stafford testified that he never received any money from Myers or Adler.

On one occasion Stafford and DeMaddalena were observed conversing at a car wash in Arcadia. According to the Court of Appeal's opinion (p. 10), the next day DeMaddalena gave Gunn two $100 bills. As we have previously stated, on or about the time DeMaddalena gave Gunn $200, DeMaddalena had borrowed $200 from the credit union. Stafford denied that he ever gave DeMaddalena $200. (R.T. p. 2228) Regarding this incident, the owner of the car wash testified in Stafford's behalf (R.T. p. 2390)

On March 20, 1964, Stafford was arrested in the schoolyard and taken to the motel outside of the city of Los Angeles and treated in the degrading manner that we have already completely

and thoroughly covered. It was at this time that Stafford's notebooks were illegally seized—later becoming Exhibits 69 and 70 at the trial. These books contained hundreds of items of information. Certain numbers were selected from these books and an attempt made to correlate them with numbers in DeMaddalena's book, Exhibit 3. Certain investigations were made of these numbers and some arrests were made. Since we have already covered this phase completely in the petition itself, we will not repeat here what happened to this investigation of so-called "protected" numbers.

It was developed throughout the trial, by interrogation of the various police officers, that practically every police officer—particularly vice officers—keep numbers in a book and names of suspects and informants. Further, that they frequently and commonly give numbers to one another and exchange information. Often they get the same numbers from different informants. It would have been strange, indeed, not to have found the same or similar numbers in the books of different vice officers, and it would have been even stranger if the officers had selected numbers out of any policeman's book—including Stafford's—and made inquiries about them and had not found, in some instances at least, that there were lawbreakers present or that some rule of law was being violated. Stafford had no city-wide control; his duty was only over a very limited area. In fact, it was a rule, if they wanted to check a telephone number and get the address or the number at a certain address, they had to go through the Intelligence Division, which had city-wide jurisdiction. DeMaddalena did not testify to seeing Stafford get any money from anybody; nor did any other officer so testify or any witness in this trial so testify that they ever saw anybody give Stafford a dollar; nor did any officer,

except Officer DeMaddalena, say that he ever got any money from Stafford—except expense money which was properly distributed by Stafford in accordance with police regulations. The People's own witness, Safford, in describing bookmaking and the manner in which officers operate, stated that he usually maintained a book wherein he kept information such as the sources of information given to him with reference to bookmaking; that sometimes the information came from another officer, sometimes from another bookmaker, sometimes from an unknown source; and that all information is checked out. (R.T. pp. 156, 157) Further, that he had maintained books at all times wherein he kept such information, and that officers are required by department order to maintain a personal notebook at all times. (R.T. p. 158) Particularly was this true with a vice officer—that they in particular would have telephone numbers in their books and names of persons suspected of engaging in bookmaking and the names of informants and the names of purported bookmakers and their addresses and telephone numbers, telephone numbers where a bet might be made or a bet might be stiffed in. This was not at all unusual. (R.T. pp. 158-161)

On the night that Gunn was given the $50 bill, he and DeMaddalena had worked several bars and had had several drinks. (R.T. pp. 414, 415, 432) Even Gunn admitted that vice officers kept notebooks containing telephone numbers and addresses which would be of assistance in their work, and that from time to time they would discuss their notes with other vice officers. (R.T. p. 483) Gunn testified that sometimes he had such discussions with DeMaddalena. (R.T. p. 485) Even Gunn stated that a part of a vice officer's duties was to become friendly with bookmakers or suspected bookmakers;

that vice officers sometimes eat with bookmakers and drink with them when trying to get information; and that he had acquired information many times from informants. (R.T. pp. 542-544) Gunn testified that in the course of discussions with DeMaddalena, DeMaddalena named several officers in vice who purportedly had been receiving payoffs for years from Chinatown, including an officer on the night watch in Chinatown, and that this officer was still taking payoffs; and another officer DeMaddalena named was purportedly taking payoffs to permit gambling games in Chinatown. Further, Gunn testified that DeMaddalena told him it was unfortunate they were not working nights, as they could make a thousand a month if they did. (R.T. pp. 542-548) According to Gunn, DeMaddalena also told him that he was a personal friend of the captain and, by reason of that, they would work together as partners for a long time; that Stafford only had a few more months to go in his capacity in Central Vice. (R.T. p. 550)

All of the officers whom DeMaddalena accused—some of whom DeMaddalena said had received thousands of dollars—with the exception of one, were called as witnesses and they denied ever receiving any payoff money.

Gunn denied a conversation with one Henry Davis, a fellow officer, in which Gunn had informed Davis that DeMaddalena was a "lush." Davis testified that Gunn said in a conversation in the Hall of Justice that DeMaddalena was a "lush." Gunn admitted having seen DeMaddalena at the apartment of DeMaddalena's girlfriend when the girlfriend said to DeMaddalena, "You're drunk; why don't you tell the truth." (R.T. pp. 556-558) Gunn also testified that on one occasion he had gone to the Blue Front Bar with a policewoman

and had met DeMaddalena and other officers there and, while there, one of the officers told DeMaddalena to quit drinking and running around with women. (R.T. pp. 557-559) Gunn testified that on that particular night DeMaddalena was too drunk to drive. Gunn further testified that there were times when he covered for DeMaddalena when DeMaddalena did not come to work; that he told his captain on one occasion that DeMaddalena was on the ragged edge.

DeMaddalena finally wound up at the Edgemont Hospital under the care and treatment of Dr. Stuart C. Knox. Dr. Knox testified that his opinion was that it had taken close to ten years for DeMaddalena to reach the condition he was in, that DeMaddalena was a psycho-neurotic alcoholic and that DeMaddalena's brain was affected. (R.T. pp. 2539-2549)

The opinion of the Court of Appeal (Appendix "A" pp. 11, 12) sets forth a recorded conversation made by Officer Gunn to Mr. Adler on March 20, 1964. Mr. Adler's response to this call will be found at Reporter's Transcript p. 2388.

Following this, Officer Gunn made two calls to Mr. Myers (Appendix "A" pp. 12-17). Mr. Myers' testimony regarding these telephone calls will be found at Reporter's Transcript pp. 2903-2906.

With reference to Mr. Miller—a produce man—evidence was offered as to an incident which took place after any possible conspiracy had long since ended, where he went to a bank concerning a check that had been given for rent. This evidence was highly prejudicial and certainly not material, and it was incompetent because of its late date.

In closing may we state that it was the drunken declarations of DeMaddalena to Gunn upon which a large part of this case was based, and we contend that no conspiracy was established.